What Denning L.J. said in *Ward* v. *Lewis & Ors.*[2] was most aptly cited in the judgment of the court below. The conspiracy to defame had indeed merged with the claim for libel. Therefore the learned judge was with respect right in making the order tc strike out the allegations in paragraphs 9 & 10 of the statement of claim referring to the conspiracy to defame.

*Appeal dismissed.*

Solicitors: *Mah-Kok & Din; Eugene Lye & Co.; Ng Ek Teong & Partners.*

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## TAN SRI TAN HIAN TSIN v. PUBLIC PROSECUTOR

**[F.C. (Suffian L.P., Raja Azlan Shah Ag. C.J. (Malaya), Wan Suleiman, Chang Min Tat and Syed Othman F.JJ.) September 7 and 27, 1978]**

**[Kuala Lumpur — Federal Court Criminal Appeal No. 51 of 1977]**

*Criminal Law and Procedure — Criminal breach of trust — Conversion of money to own use for temporary period — Burden on accused — Penal Code, s. 409.*

*Evidence — Secondary evidence of documents — Burden on accused — Evidence Act, 1950, ss. 63(b) and 65.*

*Company Law — Director — Declaration of interest — Companies Act, ss. 42(2)(c) and 131.*

*Penal Code, s. 409 — Criminal breach of trust — Company officers.*

This was an appeal against the conviction of the appellant on a charge of criminal breach of trust of the sum of $200,000 belonging to a company, of which the appellant was the Chairman and Managing Director. The cheque had been issued in payment of an alleged debt to a company in Taiwan but it had been paid into the account of a company, of which the appellant and his wife were the only shareholders.

**Held,** dismissing the appeal: the learned trial judge was justified on the evidence in calling upon the defence and in finding that the appellant had not cast any doubt upon the truth of the prosecution evidence.

*Cases referred to:-*

(1) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.

(2) *Mohamed Yatim* v. *Public Prosecutor* [1950] M.L.J. 57.

FEDERAL COURT.

*M. Shankar* (*G. Sri Ram* and *Paul Chang* with him) for the appellant.

*T.S. Sambanthamurthi* (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

**Chang Min Tat F.J.** (delivering the judgment of the Court): The appellant was convicted of the offence of criminal breach of trust, an offence punishable under section 409 of the Penal Code, in respect of a sum of $200,000 belonging to Folex Industries Berhad, of which he was at the relevant times the chairman and managing director.

The evidence for the prosecution was hotly disputed by the appellant but this much of it is indisputable. On June 24, 1974, a cheque was drawn on Folex's account with the United Malayan Banking Corporation Berhad (UMBC) for $200,000. The drawee on the face of it was Tatung Sydicate (*sic*). The persons who signed the cheque were Ho Wing Kei (Ho), and the accused. Both had authority to sign Folex's cheques. The printed words "or bearer" were cancelled and the cheque was crossed with a stamp impression reading "A/c Payee only." Then by another impression the crossing was cancelled and the cancellation was authorised by the short signatures of Ho and the accused. On the reverse of the cheque, there was a rubber stamp impression bearing the words "Tatung Sydicate" (*sic*), with a signature identified to be that of a Miss Chuah Soo Ha, an employee of Folex. It became for all practical purposes a bearer cheque.

This cheque was paid into the account of Kwong Hing Trading Co. (Kwong Hing) with the Bank of Tokyo on the same day and cleared. Who presented the cheque to the Bank Tokyo was not established. On the same day, Kwong Hing Trading Co. issued a cheque drawn on its account with the Bank of Tokyo for a similar amount in favour of Li Seng Min Co. (M) Sdn. Bhd. (Li Seng Min), of which the accused and his wife were at all relevant times the directors and the only shareholders. Kwong Hing's cheque was in turn presented to the Hongkong and Shanghai Banking Corporation, Kuala Lumpur (HSBC), again it is not certain by whom, for the credit of the account of Li Seng Min. At this moment in time, Li Seng Min's account with HSBC was overdrawn to the extent of $123,369.41 and the accounting effect of the deposit was to change the indebtedness of the accused and his wife to a credit.

The payment was alleged to be in payment of Folex's debt to Hwa Chiang Engineering Co. Ltd. of Taiwan (Hwa Chiang). The prosecution sought to establish that there was either no such entity as Hwa Chiang or if there was, either there was no debt due to it calling for any part payment of $200,000 or no payment was in fact made to it in reduction of such debt. It adduced further evidence to add flesh to the bare bones of the case against the accused.

First, the prosecution adduced evidence of an inspection of the premises of Hwa Chiang at the address shown on its letterheads and produced photographs to show that the premises could not possibly be an engineering workshop or plant. They were indeed those of a flat or small residence. However the scope of the business activities claimed for Hwa Chiang was not so unequivocably stated as to establish a workshop. Hwa Chiang was perhaps only the provider of expertise in the purchase of machinery and did not need a workshop or a factory and moreover, there was evidence of the registration of such a concern according to the laws of Taiwan.

Then the prosecution contended that if there was, there was not, so far as it could discover, any actual business relationship between Folex and Hwa Chiang and there was no satisfactory document to establish this relationship. What the prosecution discovered and recovered from Folex were, firstly, three letters (Exhibit D7A, B & C) bearing the dates January 16, February 4 and April 16 of 1969 conveying the offer to Folex for the construction of a polypropylene weaving plant, a texturised synthetic yarn and knitting plant and a textile finishing cotton/tetoron-cotton plant on terms which excluded the cost of the land and the building or buildings in which the plants were to

be erected. These offers were accepted by the accused, by his endorsements on the letters of offer. The endorsements bore the respective dates of February 3, April 4 and July 14, 1969. These, the so-called turn-key contracts, would appear to be concluded contracts by offer and acceptance.

But the curious thing about these turn-key contracts was that they were not typed in and sent from Taiwan but they were typed in the office of Folex itself by the staff of Folex on letterheads purporting to be those of Hwa Chiang given or supplied by the accused and signed somewhat reluctantly by the accused's personal secretary, Joseph Tay, on his orders. Joseph Tay, who was not at any time employed by Hwa Chiang, also testified that these letters were typed some time later, in December, 1969.

The prosecution also produced three other offers (Exhibits P9A, B & C) reputedly from Hwa Chiang, again on Hwa Chiang's letterheads and bearing identical dates conveying the offer of "services as agents for the procurement of machinery and equipment for the establishment" of identical plants for the manufacture of polypropylene bags, for synthetic yarn and knitting and for textile finishing cotton/tetoron-cotton. These letters were not signed by Joseph Tay or by anyone but they were impressed with a rubber stamp bearing the name of Hwa Chiang. The acceptances bore the same dates as in the turn-key contracts, and they were expressed, with an unusual show of caution, to be subject to negotiations on the rate of commission. These service contracts would also appear to be concluded contracts. In the case of at least the first one, the acceptance would appear to have been conveyed to Hwa Chiang since there was a notation on the second, that the reputed offeror's copy of the letter was endorsed by the accused.

The minutes of Folex, however, indicated that the turn-key contracts were advised to the Board of Directors in three separate meetings, as perhaps required because of the different dates they bore but no copy of any such contracts was ever attached to them. The failure to do so must indeed be a curious, if not a significant, feature of the proceedings. But the Board, according to these minutes, was never told about the service contracts. The significance of such an absence will perhaps be fully seen when a statutory declaration affirmed by the accused to comply with the requirements of section 42(2)(c) of the Companies Act, 1965 is considered but before that is gone into, it is to be noted, shortly, that the turn-key contracts made the service agreements entirely unnecessary.

Section 42(2)(c) of the Companies Act requires the registration of the prospectus of a company before it can be circulated or distributed. The copy for registration is required to contain, *inter alia*, a statement or a copy of any agreement entered into by the company, and the registration is effected by a supporting affidavit by a proper officer of the company. In compliance with this requirement of law, on December 27, 1969, Matthew Thomas, the then Secretary of Folex, affirmed in three affidavits that the turn-key contracts which were annexed to them were true copies of the offers and acceptances by Hwa Chiang on the one part and Folex on the other. Then the accused as a director of Folex affirmed an affidavit disclosing copies of all agreements entered into by Folex with various firms. Copies of all such agreements were identified and annexed. The date when the affidavit was affirmed was February 24, 1971. There can be no doubt whatsoever about this date. It was more than two years after the apparent date of the first turn-key contract and more than a year after the date when Joseph Tay (PW2) said the turn-key contracts were signed by him at the request of the accused. In paragraph 1, the accused referred to the 3 turn-key agreements, curiously, not as concluded contracts, but as mere offers. Even more curiously, there was no reference whatsoever to the service agreements, though they were in existence and if authentic, capable of creating legal obligations and therefore required at this stage to be disclosed. And it is also to be noted that in that affidavit, references were made in paragraphs 5 to 13 inclusive, and in paragraph 17 to no less than 10 concluded agreements for the purchase of machinery, while paragraph 4 referred to an offer for a similar purpose and paragraph 15 to an agreement for the purchase of equipment. The questions necessarily to be raised from this affidavit are: why were the turn-key agreements referred to merely as offers, why was there no reference to the service agreements and why was there any necessity to purchase machinery from Hwa Chiang in the face of the numerous concluded contracts for this purpose from other firms? Quite frankly, there were no answers to these questions, except the strange one that with the consent of Hwa Chiang, the turn-key contracts were not acted on, by which is meant presumably that they were consensually dissolved. But if they were, they could not have been cancelled before February 24, 1971 and since at this date they were concluded contracts, why were they referred to as offers?

The evidence of the deposit of Hwa Chiang's letterheads by the accused with Joseph Tay and the use of them to draw up the turn-key contracts over the signature of the accused's personal secretary as well as the service agreements are not disputed by the accused. His explanation that it was a normal thing to deposit one's letterheads with the other contracting or proposed contracting party might or might not be true but the accused has offered no real explanation for the way in which the contracts were drawn up. The prosecution submitted that the evidence relating to the letterheads reasonably established that if Hwa Chiang existed at all, it was only a front for the purposes of the accused. The prosecution thus adduced further evidence (Exhibit P10) of the accused's use of Hwa Chiang's letterheads to offer, in his own name, a proposal to the Minister of Technology for the construction in Kuching of another polypropylene project in Kuching subject to a loan of $3 million. It suggested therefore that Hwa Chiang was the accused's alter ego.

On the other hand, the accused said that Hwa Chiang was actually one Zee Ven Ling. He was a somewhat shadowy figure and was not present at the trial to give evidence, though the Police were said to be anxious to lay their hands on him. But Zee had suffered a stroke which had affected his right eye, in 1973 some 4 years before the trial. This was suggested as a reason for his not being present at

the trial but it did not appear to have affected his mobility as it was in evidence that he had come back to Malaysia on several occasions after the affliction. However, the defence suggested that he was then too old to travel. Zee and his daughter were said to be directors of Hwa Chiang and to own it, though up to this stage there were no indications in any communication to the Board of Folex.

On September 3, 1971, Zee was appointed an additional director of Folex, almost certainly on the nomination or proposal of the accused.

His appointment imposed a duty on him, if not on the accused, to declare his interests in Hwa Chiang. Section 131 is as follows:

"(1) Subject to this section every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company....

(6) The declaration shall be made at the first meeting of the directors held....

(a) after he becomes a director;

...."

The declaration is required to be recorded in the minutes of the meeting at which it was made.

It did not appear that this duty to declare was ever discharged.

The circumstances relating to the issue of the cheque in question on June 24, 1974 must now be considered but before doing so, it is necessary to refer to matters immediately preceding it. That particular cheque is numbered 827693. Cheque No. 827691, a cheque which must be taken to be regularly issued in the course of business, was issued on June 20, 1974. Cheque No. 827692, that is, the immediately preceding cheque was therefore issued sometime between June 20 and June 24. It was made out to Tatung for $200,000. In his evidence, Ho testified that on the instructions of the accused, he had caused it to be written out, in purported payment of certain bills and vouchers handed to him by the accused, but on examination, he found them suspicious, not being on letterheads or proper company voucher or bill forms and dated as far back as 1969. He had also not known of any trading or dealings with Tatung. He had the cheque cancelled. When he made known his objections to the so-called bills and vouchers, the accused told him that Tatung belonged to Zee and was wholly owned by him and it made no difference if the cheque was made in favour of Tatung or Hwa Chiang. The accused then told him to issue another cheque for $200,000 in favour of Tatung and he would provide him with the documents proving the indebtedness to Hwa Chiang later. Ho did so. Again at the request of the accused, he had the normal crossing cancelled and both he and the accused signed the cheque and endorsed the cancellation of the crossing. Further the accused provided him with a rubber stamp bearing the name of "Tatung Sydicate" and on the instructions of the accused, he had his assistant clerk Miss Chuah endorse the reverse of the cheque with this rubber stamp and sign on it for and on behalf of Tatung. He also prepared a bank journal voucher for this payment. The particular wording of the voucher is as follows:

"To Tatung Sydicate

Advance payment of expenses incurred by Tatung — details which will be furnished in due course"

Cheque UMBC 827693.

By an amendment the name "Tatung Sydicate" was deleted and the name of "Hwa Chiang Engineering Co. Ltd." was written above it. As will be noted later, much was made of this alteration, the purpose of the challenge to Ho's evidence that he made out the cheque to Tatung on the accused's instructions being to prove that the accused knew nothing about and had nothing to do with Tatung.

The evidence of Miss Chuah while fully supporting that of Ho did not however point directly to the accused, since whatever happened between the accused and Ho did not occur in her presence.

Ho's further evidence was that he left this cheque with the accused; but this evidence the accused challenged in cross-examination. There was some other evidence relating to this cheque after its issue, but since Lim Fap Kon of Kwong Hing was for some reason not called, whatever Lim Fap Kon said to Ho on this subject necessarily remained hearsay and was not admissible to prove the truth of what he said.

Some time after June 24, Ho, one would have thought not unnaturally, asked the accused for the documents to support the payment of $200,000. This was some 2-3 weeks afterwards. The accused then drafted two letters for typing on Hwa Chiang's letterheads. The first back-dated to May 17, 1974 was a request for an advance of $200,000 against "the partial expenses incurred" by Hwa Chiang on behalf of Folex. It was further stated that details and bills would be forwarded in due course. The purpose of the back-dating was clearly to make it appear a demand, as a result of which the payment was made. The second, back-dated this time to July 24, 1974, was a purported receipt and reads:

"July 24, 1974.

Received from Folex Industries Berhad a UMBC cheque No. 827693 for M$200,000 (Malaysian Dollars Two Hundred Thousand only) being partial advance payment of expenses incurred by us."

Both were signed by Zee as director of Hwa Chiang on the same day.

But when Ho queried why the payment was to Tatung, the accused, according to Ho, said that Tatung belonged to Zee and was wholly owned by him and it made no difference if the cheque was made in favour of Tatung or Hwa Chiang. Then the accused gave Ho a set of Tatung's letterheads and asked him to copy the wordings of the purported demand and receipt of Hwa Chiang and he did exactly as he was told. The receipt from Tatung accordingly referred to the same cheque for the identical amount and purpose and bore the same date as the receipt from Hwa Chiang. Zee also signed both Tatung's documents.

Now what were produced in court was not the original Tatung's documents but photo-stat copies thereof which Ho, in his disquiet about the propriety of the whole transaction, made for his own protection, and then kept in his personal file. The question of admissibility arose. Ho said that the originals were with Folex and of course, being primary evidence,

the originals should be produced. But there was evidence from Joseph Tay that after a search of the Company's records which he carried out at the request of the Police, he could not discover the originals and in the circumstances, secondary evidence of the documents becomes available under the combined provisions of sections 65 and 63(b) of the Evidence Act 1950.

Ho's evidence is crucial to the prosecution case against the accused. Not every action of his was perhaps commendable but he ventured the explanation that whatever he did was to secure the continuance of his job. The explanation was not altogether unreasonable and he perhaps had no reason to doubt the words of such a powerful figure as the managing director of the firm which employed him that the payment was a proper one. But in at least one instance, Ho had admitted to affirming an affidavit for the purpose of complying with the Companies Act, which was false in a material particular. The defence therefore sought strenuously to brand him as a liar and gave details of at least 15 instances when he was said to have contradicted himself on other evidence. His acceptability as a witness is always a matter for the trial court. We do not have the advantages the trial judge had of hearing and seeing him in the witness box. And having heard him and the other witnesses, including the severe cross-examination in the cases of some of them and having in his mind the nagging question why if there was this debt to Hwa Chiang which could be paid to Zee, the payment was made not to Zee's account with UMBC but into the accused's holding account, the trial judge after a lengthy submission of no case to answer, decided to call for the defence.

We too have been addressed with a very persuasive submission that the defence should not have been called, especially in view of Ho's unreliability as a witness. We have considered it carefully and after due consideration, we consider that if this was a jury trial, it would have been wrong to withdraw it from the jurors. In our view and with respect, the defence was rightly called. The accused should at the least be heard to explain why he did not pay the money to Zee's account with UMBC but knowingly and wilfully ordered or allowed it to be credited into the account of Li Seng Min and how by the use of the accounting device of creating a ledger account in the name of Zee in Li Seng Min to credit the payment, he could be said not to have converted the money into his own use.

The accused's defence gave somewhat more substance to the hitherto shadowy figure of Zee. The accused first came to know him in 1958. Zee was Hwa Chiang Dyeing and Weaving Co. Ltd. which manufactured handkerchiefs and nylon socks. At a moment of an embarrassing abundance of such products, the accused bought a large quantity to relieve the situation. For Zee to be anything but grateful thereafter would be unthinkable. This weaving company was closed in 1971/1972. Zee came to Malaysia in 1970 and being without friends or family, stayed with the accused. But before that, in 1969, Zee had founded Hwa Chiang Engineering Co. Ltd. From 1969, the new Hwa Chiang corresponded with Folex for the purpose of entering into contractual relationship. The accused admitted Zee gave him Hwa Chiang's letter heads to keep in Kuala Lumpur. But there were two kinds of letterheads, two sets of letterheads which were different in design from one another and not merely the same letterheads with type-written alterations of changes of address as averred by the accused. Even if it is accepted that it was an usual commercial practice to give one's letterheads to others for use, no explanation had been ventured for the difference in design. But the accused did say that the reason why he was given the letterheads was that English as a means of written communication was not available in Taiwan.

The accused also testified that both the turn-key contracts and the service agreement were, with the consent of Hwa Chiang, agreed not to be operative and that Zee promised Folex the benefit of his experience and knowledge of machinery and of the market in Taiwan. This promise was not however in return only for the seat on the Board of Folex for which he drew a fairly substantial emolument (some $4,000 p.m.) and very generous allowances. He was to be a consultant at a substantial fee.

The accused adduced evidence through several trainees of Folex who while undergoing training in Taiwan had received their salaries from Hwa Chiang. There was also evidence of an application by Folex for an irrevocable letter of credit in favour of M/s. Wu Chiow Iron & Steel Works Co. Ltd. of Taiwan for payment of the purchase of mechanical equipment subject to inspection by Zee. Evidence was also adduced of various other letters of credit in favour of Hwa Chiang applied for by Central Sugars Co. Ltd. (which was closely associated with though a distinct organisation from Folex) and its subsidiary Kemakmoran Industries Berhad, but this evidence is clearly neither here nor there, except perhaps as to the existence of Hwa Chiang.

In the light of this evidence, the learned trial judge expressed himself satisfied that there was a Hwa Chiang in Taiwan, that Zee represented that company in Malaysia and that either Hwa Chiang or Zee made certain payments in Taiwan on behalf of Folex from 1969 onwards. He would assume that the claim of Hwa Chiang were valid.

We agree with respect that the evidence, if accepted, would establish the existence of Hwa Chiang and perhaps even Zee's representative character, though in such capacity, and in the circumstances of the claim his presence on the Board of Folex must make for a conflict of interest. We also agree that the evidence would establish certain advances made by Hwa Chiang. But all that the defence could produce were certain particulars of salaries for the staff of Folex in Taiwan. The total came to only NT$114,630, the equivalent being a paltry M$8,737.71¢. But with equal respect, we do not think it correct to assume something which was the crux of the prosecution case and also of the defence and which was therefore something necessarily to be found as a fact. The prosecution case was of a payment which was not due or owing. In the evidence of Ho, the accused had however approved of this part payment of $200,000 towards a total debt of $413,860.18 on the strength of

a bundle of documents which Ho regarded as suspicious and which he rejected. Zee's claim was then described as for "partial expenses" incurred, a deliciously vague phrase meaning nothing in particular so that there had to be a promise that details and bills would be submitted later. But up to the date of the trial, the promise was not kept. In consequence the prosecution turned to the bundle of bills, Exhibit P19, which Zee had given Ho in support of his claim. The tabulation was startling in its revelation. The evidence of the defence was that the turn-key contracts as well as the service agreements had been cancelled and Zee was merely to be a consultant at an undisclosed fee. Yet, the claims were mainly for a polypropylene and a textile plants, the contracts in respect of which had been cancelled and a nylon and a handkerchief plants in respect of which there had been no contracts and no word said as to their existence. The sums claimed were substantial. In respect of these four plants, the claim for machinery and spare parts came to NT$782,497.45, for packing and export expenses NT$16,983.80 and for freight and inland transport NT$494,477.20. These several items amounted to NT$2,093,958.45 out of a total of NT$3,036,794.25. Salaries came to NT$252,432 while claims for air passages and visas for trainees and engineers totalled NT$318,810.80. The grand total of NT$3,036,794.25 converted at the rate of NT$13,119 to M$1 was M$231,605.96. Compound interest added thereto at 13% p.a. amounted to $182,254.22. The total claim was therefore M$413,860.18 which was the exact figure stated in Zee's letter dated April 15, 1975.

It is reasonably certain therefore that the alleged indebtedness of Folex to Hwa Chiang in the sum of $413,860.18 was made on the strength of Zee's documents.

These documents were later examined by officers of a reputable firm of auditors, M/s. Price Waterhouse & Co. and their findings as set out in paragraphs 82-89 of their report (Exhibit P37) are:

"82. Not all the claims listed in the statements were supported by vouchers. In particular, there were no vouchers to support the payment of advances and salaries;

83. In the main, the claims were supported by vouchers consisting of a payment voucher or receipt, together with supporting documents, such as invoices, handwritten acknowledgements of receipt of payment, tickets, receipts, delivery notes, bank advices and expenses claim forms;

84. Payment vouchers and receipts were in the form of a standard printed cash voucher which could be used either as a payment voucher or as a receipt. We noted that the words 'Hwa Chiang Engineering Co.' were not printed on the vouchers.

85. In the main, the documents supporting purchases of machinery, spares, etc. appeared inadequate due to the following reasons:—

(a) Purchases were generally not supported by a printed invoice containing details of goods purchased and the suppliers' name. In most cases, only the payment voucher could be seen.

(b) In some cases, attached to the payment vouchers for the purchases were either slips of paper containing brief details of goods purchased or a slip of paper acknowledging receipt of cash without details of the goods sold on it.

(c) There were cases where the amount acknowledged as received in the slips of paper did not agree with the payment voucher.

(d) There was no indication on the slips of paper as to who had issued them.

(e) Some payment vouchers were only supported by slips of paper containing the estimated cost of the purchases. There was no indication on the paper as to who had prepared them. The amounts did not always agree with the payment vouchers.

(f) The name 'Hwa Chiang Engineering Co.' were not stated on some invoices. Instead, the name of some other local Taiwanese company was noted.

(g) Not all purchases were supported by delivery notes. For those that were supported by delivery notes there was no indication on the delivery notes to indicate that the goods were received by Hwa Chiang.

86. We noted that, included in the expense claims for travelling by certain individuals, were claims of knowledge, drama books, book on proverbs, expenses incurred for dancing and purchases of household decorations.

87. We were unable to identify the individuals who had submitted expense claim forms and were reimbursed according to the vouchers and statements.

88. We were unable to identify the individuals who were paid salaries and advances as claimed by Hwa Chiang. Also, no vouchers were submitted to support these payments.

89. We were unable to determine if the machines stated in the claims submitted by Hwa Chiang were received and paid for by Folex. This was due to the fact that the statements did not contain detailed description of the machinery and equipment purchased together with serial numbers. We were also unable to examine documents pertaining to the establishment of the various plants such as invoices from Hwa Chiang, details of machinery and equipment purchased and installed, correspondence with Hwa Chiang, details of Hwa Chiang's personnel involved in the establishment of the plants, and other relevant documents which would enable us to examine the Hwa Chiang claims in depth."

They show that Ho had every reason for his suspicions and rejection of them.

The imposition of interest at what must be regarded as an excessively high rate was never made known by the accused to the Board of Directors or to the accounts department of Folex. The accused said it was at first orally agreed by him with Zee and he later produced a letter from Zee bearing the date April 17, 1974, imposing, at this late date, this rate of interest. The question must be asked whether, in the interest of the Folex of which he was the managing director as well as the finance director, the accused should not have made an even more strenuous attempt at reducing, if not at resisting, the imposition of this interest.

Another comment was made by the prosecution. It could not see any reason why Hwa Chiang did not require to be paid by letters of credit, to which it was accustomed and which were the usual means of payment for international purchases.

Insofar as the accused was concerned, we are of the opinion that a view that the accused must be taken to have known of the nature of these documents, as otherwise he would not have drafted the letters (on Hwa Chiang's and Tatung's letterheads) bearing the date May 17, 1974, promising details and bills, would not be unreasonable, having regard to the evidence.

If the learned judge had, on the evidence of these old documents and in the absence of the promised details and bills which inferentially were available, found no doubt that such a sum of $413,860.18 was not owing or due to Hwa Chiang, an appellate court

would have hesitated long before it would presume to interfere with the inference he drew. But he proceeded on the assumption that there was such a debt and the appeal must necessarily proceed on this basis.

The accused said Zee had been pressing him for payment, or at least part payment but he did not prefer Zee to the other creditors and he did not order that he be paid on June 24, 1974. But when the cheque was presented to him for signature, he signed it in the belief induced by the substitution of the name of Hwa Chiang for Tatung on the voucher that it was in payment to Hwa Chiang. He blamed Ho at every instance. Not only did Ho make the vital decision to pay the $200,000 to Hwa Chiang at a moment, when in his own admission he knew Folex was in financial straits, but it was Ho who directed the course of the cheque until eventually via an interchange of cheques with Kwong Hing, the money was deposited into Li Seng Min's account. He thought and he had every intention that the money was to be paid to Hwa Chiang. The accused called his clerk Miss Lilian Lau to contradict Ho that it was not he who gave her Kwong Hing's cheque for $200,000 to be paid into Li Seng Min's account.

On this Mr. Shankar for the appellant submitted that no offence had been committed. We agree with his statement of the law that no offence of criminal breach of trust is committed if the money is used to reduce the company's indebtedness to one of its creditors. But, with respect, this statement of the law is predicated on the assumption that at no time before the use of the money to reduce the indebtedness, the person who effected the payment, had converted the money to his own use, for however short a period of time. If he does so, then he is as guilty of the offence as the person who dips his hands in the company's till on a Saturday morning for his own use, say for instance, a week-end's flutter at the races or the casino, even though he has every intention to repay the money and in fact does so the first thing on the following Monday morning.

To the trial judge, the defence did not fit in with the law propounded by Mr. Shankar. But he was said to have disbelieved the defence, and on this reading of his grounds of decision, an attack was mounted and directed against his handling of the case. It was submitted, if we may so summarise the point taken, that in the face of several decisions, *inter alia, Mat* v. *Public Prosecutor*[1] and *Mohd. Yatim* v. *Public Prosecutor*,[2] he had imposed on the defence a burden of proving his innocence beyond doubt and the misdirection was therefore so substantial that the verdict should not be allowed to stand. We have therefore read the grounds of decision with some care and we find that the only instance the learned judge used the words "I cannot believe" was in connection with the accused's evidence that he did not know the cheque was made out to Tatung. The issue whether the accused knew or did not know that the drawee on the face of the cheque was Tatung was only an incidental one in the case. The crux of the case was whether the accused had misappropriated the cheque and on this issue, the learned judge expressed himself to be satisfied on the whole of the evidence that he had done so and converted the money to his own use on June 24, 1974. We therefore reject as groundless any suggestion that the learned judge had required the accused to prove his innocence beyond reasonable doubt. If the learned judge had erred at all, he had erred, we say so with respect, in favour of the accused in his assumption that Folex was indebted to Hwa Chiang instead of reviewing the whole of the evidence and coming to a definite finding of fact.

This apart, we are, with respect, satisfied with the judge's careful handling and review of the evidence. He could see no financial or other interest for Ho to do what he did and he could only conclude that Ho was acting throughout on instructions. He was satisfied that the $200,000 drawn from Folex for the ostensible purpose of paying Hwa Chiang was paid into the accused's own company's account to reduce the overdraft. If he did not consider the round-about manner in which the money was eventually paid in, namely by an exchange of cheque with Kwong Hing, it was obvious, and with respect we agree, that the manner of deposit was not germane to the issue of the guilt or innocence of the accused. In his own evidence, the accused had admitted that Miss Lilian Lau had told him of a cheque made out to Li Seng Min for $200,000 and that without pausing to enquire how this windfall came about, he had immediately said to credit the account of Zee. He must therefore have known throughout that the cheque was meant for Zee. Yet as the learned judge observed, Zee had no account in Li Seng Min and there was no reason why he should start one there, especially as he had his own account with another bank, into which this open cheque, whether drawn in favour of Hwa Chiang or Tatung, could have been paid without any difficulty whatsoever. Further, the learned judge could conceive of no benefit to Zee by keeping the money in Li Seng Min's account when as he stated in his letter, Zee had wanted the money for investment purposes. Finally, "bearing in mind the urgency of the payment in June, 1974, there appears to be no satisfactory explanation why the $200,000 is still with Li Seng Min to this day." It is obvious that to the learned judge the defence had cast no doubt as to the truth of the prosecution case, even given the premise of the debt to Hwa Chiang which he assumed.

We should perhaps now touch on two letters produced by the defence which the learned judge did not consider, almost certainly because they were not referred to by the defence for the use they could be put to. They were (1) a letter to the accused, enclosing (2) a letter to Ho. Both were written in Chinese and purported to be signed by Zee. The date was April 16, 1974. Both asked for payment either in one lump sum or by instalments. In the letter to Ho, the writer alleged that all the evidence, receipts and statements of accounts had been submitted to Folex for checking long ago. The letter to the accused contained these additional words.

"If, within this period (of one month or two when Zee would be touring America), Folex could pay the debt in full or in part to Hwa Chiang, regardless of the amount, please receive and keep it for me temporarily."

If it emanated from Zee as it purported to be, it would give authority to the accused to receive and keep the money. It would constitute the accused the

agent of Zee for the receipt of the money. It would, if accepted, fit the defence within the definition of the law submitted by Mr. Shankar.

On the question of their genuineness, Ho denied having previously received the letter addressed to him and having seen the letter to the accused. Ho also denied the accused's allegation that they were written at his (Ho's) suggestion for "an authorisation for payment of money". Ho also thought that the signature was not Zee's usual signature. The accused who produced these letters at his trial did not explain how he had come to retain them when at least one of them was addressed to Ho or why he had referred only to the letter to him without referring to the letter to Ho which was on the face of it enclosed with it. He ventured the evidence that "when I found the letter on my table and read it, I felt 'funny'." This was a queer reaction to a completely reasonable request for repayment of a debt alleged and there was no reason to feel "funny" whatever he meant by it or to send for Zee as if to reproach him for it or to question him on it.

On the question of the purport of the letter to the accused, it was tendered by the defence as evidence of the debt and the demand for repayment, but, strangely, not as authorisation to keep the money. The accused would appear to have completely misread the letter for its full effect. On the other hand, this letter was of course at variance with at least two of Zee's letters, those of May 17, 1974 wherein Zee promised to forward the details and vouchers for the claim.

Even on the strength of these latter letters and the allegation that the accused had retained the money from June 24 to July 24, 1974, the accused had committed criminal misappropriation of the money. To refine the case of the clerk who dips his hands into the firm's till somewhat, if he is in possession of the firm's money with a duty to bank it or to pay it over to a particular person in discharge of the firm's debt to this person and he only does so after using it for his own purpose for however short a period of time, he is guilty of misappropriation.

But the learned judge had found that the accused had not to the date of the trial paid the money over to Zee or Hwa Chiang. There had been no withdrawal of this amount from Li Seng Min. Neither had the accused indicated any remittance to Zee from any of his other sources. We are not prepared to differ from the learned judge's finding. The accused had, indeed, not cast any doubt on the truth of the prosecution evidence.

Accordingly, we dismiss the appeal against conviction.

*Appeal dismissed.*

Solicitors: *Sri Ram, Chan & Chia.*

## ONG KIM KHOON v. GAYA FILEM BHD.

**[F.C. (Raja Azlan Shah, Wan Suleiman and Chang Min Tat F.JJ.) May 29, 30 and September 28, 1978]**
**[Kuala Lumpur — Federal Court Civil Appeal No. 177 of 1977]**

*Land Law — Conveyancing — Completion of sale — Letter confirming approval of loan to purchaser — Whether sufficient tender of purchase price.*

In this case the respondent had agreed to purchase land from the appellant for the purchase price of $230,000, of which the usual 10% or $23,000 was paid on the execution of the contract. It was agreed that the balance of $207,000 was to be paid to the stakeholders "not earlier" than three months from the date of the agreement which was August 19, 1974 or upon obtaining vacant possession, whichever should be later. Vacant possession of the property was handed over to the respondent on November 10, 1974. Completion should therefore have been on February 10, 1975 but by that date the balance of the purchase price had not been paid. The respondent complained of defects to the house on the land and the repairs were undertaken by the appellants. On December 17, 1974 the respondents had paid a further sum of $20,000 to account of the purchase price and on February 25, 1975 the respondents sent a letter to the appellants alleging an agreement to defer the completion date to March 10, 1975 "at the latest" which the appellant endorsed. On March 10, 1975, the solicitors for the appellant received a letter from the solicitors of a finance company to whom the respondent had applied for a loan in order to complete the purchase, confirming the approval of a loan of $160,000. On the same day the respondents paid to the same solicitors, who were named in the contract as the stakeholders, the sum of $27,000 in cash. On March 19, 1975 the appellant wrote to the effect that if the respondent failed to complete the sale on or before March 25, 1975 he would terminate the sale and forfeit the deposit and on April 17, 1975 he wrote to the respondent terminating the sale. The respondent thereupon brought an action to seek specific performance of the contract of sale of the land and the High Court ordered specific performance as the learned Judge held that the respondent had complied with the obligation to pay the balance of the purchase price. He held that the advice of the approval of the loan of $160,000 and the payment in of $27,000 constituted full compliance with the respondent's obligation to complete the purchase. The appellant appealed.

**Held,** allowing the appeal: on a proper construction, the respondent must be held to have contracted to pay the balance of the purchase money to the stakeholders in cash. There was no evidence in this case that the appellants had agreed to a variation in the form of tender and the learned trial judge was therefore wrong in holding that merely accepting a copy of the letter of March 10, 1975 from the lenders to the solicitors for the appellants was acceptance of the mode of payment and sufficient tender.

*Cases referred to:-*

(1) *Finch* v. *Brook* (1834) 1 Bing. N.C. 252.
(2) *Re Farley, ex parte Danks* (1852) 2 De G.M. & G. 936.
(3) *Farquharson* v. *Peare Assurance Co.* [1973] 3 All E.R. 124.
(4) *Jennings* v. *Zihari-Kiss* [1972] 2 S.A.S.R. 493.
(5) *Re Roper* [1959] 2 All E.R. 605.
(6) *Beeves & Anor.* v. *Mason,* Times, July 19, 1978.
(7) *Chintamanie Ajit* v. *Joseph Mootoo Sammy* [1966] 3 W.L.R. 983.

FEDERAL COURT.

*J.G. Bernatt* for the appellant.

*V.K. Palansuntharam* (*S. Kulasegaran* with him) for the respondent.

**Raja Azlan Shah F.J.:** I have had the advantage of reading in draft the judgment of my learned brother Chang Min Tat F.J. I agree with it and with his conclusion that the appeal and counter-claim be allowed.